

Transcript, Meeting of the Minnesota Public Utilities Commission
April 14, 2003
PUC Docket No. P-421/C-02-197

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1 BEFORE THE PUBLIC UTILITIES COMMISSION
2 OF THE STATE OF MINNESOTA

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 Leroy Koppendraye, Chair
 Marshall Johnson, Commissioner
 Phyllis Reha, Commissioner

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11 In the Matter of Further
12 Reconsideration of the Complaint
13 of the Minnesota Department of
14 Commerce Against Qwest Corporation
15 Regarding Unfiled Agreements

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 PUC Docket No: P-421/C-02-197

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 Minnesota Public Utilities Commission
 350 Metro Square Building
 121 Seventh Place East
 St. Paul, Minnesota
 Large Hearing Room
 April 14, 2003

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 Met, pursuant to notice, at 10:05 in the
morning.

 COURT REPORTER: Angie D. Threlkeld, RPR CRR

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 CHAIR KOPPENDRAYER: Good morning.
Welcome to the commission this Monday morning --
April 13, is it?

 COMMISSIONER JOHNSON: 14.

 CHAIR KOPPENDRAYER: 14. April 14. And
thank you for responding to the short notice that
the commission gave to reconsider by its own order
the issue of the 271 -- of the commission's response
to the 271 filing as it pertains specifically to the
unfiled agreements and the penalties that were
proposed.

 With that, Mr. Oberlander, do you have
any comments?

 MR. OBERLANDER: Commissioners, as the
chair has just indicated, the purpose of the meeting
this morning is for the commission to reconsider its
prior decision upon the commission's own motion. On
April 10th the commission did issue a written notice
pertaining to the meeting this morning, and in that
notice the commission informed the parties that
reconsideration would be focused narrowly upon the
issue of whether Qwest shall make retrospective

23 credits and/or cash payments to customers for
24 interstate access services purchased from Qwest.
25 And that notice was issued in Docket 02-197. That

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1 is the complaint case regarding unfiled agreements.

2 CHAIR KOPPENDRAYER: Thank you,
3 Mr. Oberlander.

4 Let me -- In the interest of full
5 disclosure, because this is a very important case
6 and we have all had a part in it and it has taken
7 some unusual turns, let me explain that there's
8 three commissioners here this morning; Commissioner
9 Reha, Commissioner Johnson, and myself.
10 Commissioner Scott is not here because his wife's
11 mother had a heart attack, and they're at
12 North Memorial Hospital. So he could not be here.

13 And then let me just go on to add that
14 time -- the time that FCC -- the time that we -- the
15 time frame that we have because of the FCC order and
16 the timing that we have to get our response in is
17 upon us.

18 And also -- And just on a personal note
19 I'll add that this is the last chance that I have to
20 be here and get my response written to the FCC
21 because I have a granddaughter who has only two
22 chambers in her heart and she is going to have open
23 heart surgery on Thurs -- on Wednesday, day after
24 tomorrow, in Michigan. They're going to open her
25 heart up and make four chambers, and that will be

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1 one day before her first birthday. And so we're
2 going to -- I'm going to leave today so we can go
3 there, and then I won't be available after today for
4 this.

5 So a variety of circumstances have put us
6 as individual commissioners under the gun also. But
7 we take this issue very, very seriously and want to
8 dispose of it in a fair and judicious manner.

9 So, with that, I believe Commissioner
10 Reha, you have -- Excuse me one moment.

11 Let's see who is on the telephone. Do we
12 have folks on the telephone?

13 MR. WEIGLER: Yeah, this is Steve Weigler
14 and Janet Browne from AT&T.

15 CHAIR KOPPENDRAYER: Say your name again.

16 MR. WEIGLER: Steve Weigler and Janet
17 Browne.

18 CHAIR KOPPENDRAYER: Oh, okay. And,
19 Mr. Weigler, are you going to comment or are you
20 going to have Mr. Witt comment or --

21 MR. WEIGLER: Mr. Witt will comment.
22 We're just listening.

23 CHAIR KOPPENDRAYER: Okay. Anyone else
24 on the phone?

25 (Inaudible.)

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1 CHAIR KOPPENDRAYER: One moment. We're

2 going to see if we can turn the volume up so we can
3 hear your response. Let's try it again. Those on
4 the phone state your name individually.
5 MR. THOMAS: Brian Thomas from Time
6 Warner Telecom.
7 CHAIR KOPPENDRAYER: Brian?
8 MR. THOMAS: Thomas.
9 CHAIR KOPPENDRAYER: Thomas.
10 And Mr. Weigler.
11 MR. WEIGLER: Right.
12 CHAIR KOPPENDRAYER: Thank you. We got
13 our volume up.
14 So then let's have for the record you
15 folks introduce yourselves.
16 MR. DOYLE: Greg Doyle, Department of
17 Commerce.
18 MR. ALPERT: Steve Alpert representing
19 the Department of Commerce.
20 MS. LEHR: Lesley Lehr, MCI.
21 MR. WITT: Gary Witt with AT&T.
22 MS. GULLIKSON: Joy Gullikson with Onvoy.
23 MR. TOPP: Jason Topp from Qwest.
24 MR. ARTMAN: Todd Artman (phonetic), Time
25 Warner Telecom.

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1 CHAIR KOPPENDRAYER: With that,
2 Commissioner Reha, then, since all of us voted in
3 favor of the last order, then anyone can make a --
4 COMMISSIONER REHA: Right.
5 CHAIR KOPPENDRAYER: -- motion to
6 reconsider.
7 COMMISSIONER REHA: MR. Chair, I would
8 move that we reconsider -- that we reconsider our
9 order from April 10th with respect to the access
10 issue in 3A, and I have a motion to make.
11 CHAIR KOPPENDRAYER: Why don't you go
12 ahead and make that motion.
13 COMMISSIONER REHA: First I want to
14 explain what it was. After the meeting I -- I got a
15 draft of the order from our staff, and it became
16 very clear to me that we did not have a meeting of
17 the minds in terms of what the order would read with
18 respect to access. And I apologize. It was
19 probably my mistake. But I had assumed that the --
20 when they mentioned the Bradley language was
21 included, I was assuming that the Bradley language
22 with respect to excluding Internet (sic) access was
23 included in the motion.
24 So -- And I had mentioned that to the
25 chair procedurally and also mentioned it to

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1 Commissioner Scott. And Commissioner Johnson was
2 not available. And both commission -- Chair
3 Koppendraye and Commissioner Scott indicated that
4 they would not oppose the motion as I would make it.
5 And so we called this special meeting at my request.
6 And I would move to amend 3A to exclude

7 Internet (sic) access services. So as I understand
8 how it would read is that: Qwest shall give either
9 in cash or by credit at the CLEC's choice the
10 equivalent of a 10 percent discount on all Minnesota
11 products and services, excluding Internet (sic)
12 access services, that the CLEC purchased from Qwest
13 between November 15, 2000 and May 15, 2002. And
14 that would be my motion, Mr. Chair. Yes.

15 CHAIR KOPPENDRAYER: I believe Ms. Hammel
16 has a comment.

17 MS. HAMMEL: Chair Koppendraye,
18 Commissioner Reha, did you mean to say interstate --

19 COMMISSIONER REHA: Did I say --

20 MS. HAMMEL: -- access services?

21 COMMISSIONER REHA: Didn't I say
22 interstate?

23 MS. HAMMEL: You said Internet.

24 COMMISSIONER REHA: Oh, I'm sorry.

25 Interstate access services. Thank you for catching

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1 that. I didn't even realize I misspoke.

2 CHAIR KOPPENDRAYER: Thank you.

3 Any questions of Commissioner Reha?

4 Just let me also -- Because of the unique
5 circumstance that we find ourselves in, let me state
6 that after Commissioner Reha brought this to light,
7 Commissioner Scott came to my office and said
8 specifically to me on Friday that he didn't have a
9 problem with having a meeting to accommodate
10 Commissioner Reha's concern and that he also felt
11 that it would strengthen the case if it were
12 appealed. And then that's where the issue was left
13 until we find ourselves this morning without him
14 being able to be here.

15 So, with that, I guess AT&T has filed
16 some comments that we have this morning; and I guess
17 we could admit them into the record with no
18 objection.

19 COMMISSIONER REHA: That's fine. I
20 reviewed those comments too, Mr. Chair, this
21 morning.

22 CHAIR KOPPENDRAYER: And then if any of
23 you folks would like to comment on Commissioner
24 Reha's motion I think before we deliberate, why we
25 could entertain those comments. So who would like

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1 to go first?

2 Mr. -- Mr. Witt, since you filed comments
3 already, maybe you're prepared to go first.

4 MR. WITT: Thank you, Mr. Chairman,
5 Members of the Commission. Yes, we did file
6 comments on Friday. They were rather hastily put
7 together, but on the other hand I think they do
8 present a fairly strong position for the commission.

9 I guess I would say that the commission
10 need not exclude interstate access from this
11 particular decision. I think that when you -- when

12 you look at the precedent that has been discussed in
13 this particular case and you do the same analysis
14 that has been done in that case law and apply it to
15 this -- to the circumstances here, the result is
16 different than in the case that has been cited
17 previously. And if I recall correctly, that was the
18 United States District Court case of Qwest versus
19 Scott. And I can provide the memorandum opinion
20 order number if you like.

21 But the essential point that I guess I
22 would like to make here is that the case in question
23 goes -- goes into several different criteria for
24 determining whether a federal preemption argument is
25 applicable in this particular case. And if you go

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1 through the same analysis that's done in the case
2 and take that -- take that analysis and apply it to
3 the facts and circumstances here, the result is
4 different, primarily because you don't have -- first
5 of all, you don't have specific federal authority
6 which attempts to or gives any indication of a
7 preemption.

8 And so there's been no -- There's been no
9 attempt by the federal government to preempt in this
10 particular area. It has been left up to the states
11 to date anyway. And there's nothing that I can see
12 that would -- that would indicate that the federal
13 government intends in the future to preempt in this
14 particular area. So that -- I think that the
15 preemption argument really is not as strong as
16 perhaps it's been characterized by some other
17 parties to this particular case. And my own urging
18 would be that the commission hang on to the
19 authority that it has in this particular area to the
20 extent that it's able to hang on to that.

21 I'll leave it at that and simply say that
22 we believe we've made our case very strongly in the
23 comments. I would urge you to, you know, review
24 those comments in depth when you get a chance. And
25 if I -- if you have any questions at this point, I'd

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1 be more than happy to entertain them. Thank you.

2 COMMISSIONER REHA: Thank you.

3 COMMISSIONER JOHNSON: Well, Mr. Chair --

4 CHAIR KOPPENDRAYER: Commissioner
5 Johnson.

6 COMMISSIONER JOHNSON: -- this might not
7 be the right time to do it, but I think I will.
8 I've been out of town, as you indicated, and I
9 haven't had a chance to visit with any of you. So,
10 Commissioner, why are we doing this or why are you
11 proposing this?

12 COMMISSIONER REHA: I think in my view
13 the commission is vulnerable on the issue of
14 ordering interstate access when it's under the FCC
15 jurisdiction to do so since we are doing the
16 restitution penalties based on state law. And in my

17 view I think we've crafted a very strong and
18 defensible order. Qwest, unfortunately, has
19 indicated that they cannot accept the penalty with
20 respect to either interstate or intrastate access.
21 And I would say in my own mind that if Qwest were to
22 agree to the restitutional portion of our penalties
23 and -- even if they feel that our monetary penalties
24 are too high, that if they went forward and
25 indicated that they would perform the restitutional

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1 part of our penalty and even appeal simply the
2 amount of the fine or penalty, you know, that I -- I
3 would feel that they've met checklist item 14 with
4 respect to issues related to the unfiled agreements,
5 and I would probably approve 271 or recommend
6 approval to the FCC --

7 COMMISSIONER JOHNSON: Yeah, I know how
8 you --

9 COMMISSIONER REHA: -- 271.

10 COMMISSIONER JOHNSON: -- feel there.

11 But basically what I heard you say -- and I agree
12 with you on the latter part of it -- but the first
13 part that it would strengthen our order if we did
14 this.

15 COMMISSIONER REHA: Right. That's my --

16 COMMISSIONER JOHNSON: And I --

17 COMMISSIONER REHA: -- my opinion based
18 on my reading of the comments and the argument that
19 we had received last -- on April 10th. And we
20 talked about this at great length. And that's I
21 think where the confusion came in because it was my
22 assumption that that's where the commission was by
23 consensus, and apparently Commissioner Scott was not
24 quite there and didn't -- his motion did not cover
25 the interstate access exclusion, and I thought it

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1 did. And that was -- it was a mistake on my part,
2 and my mind must have been wandering.

3 COMMISSIONER JOHNSON: I agree.

4 COMMISSIONER REHA: And so -- And so I
5 just -- My goal here is to get the best crafted,
6 most reasoned, measured, appropriate, legally
7 defensible order that's possible; and I think with
8 this modification in it that we have it on every
9 point.

10 And -- And on the issue of the quantity
11 of the penalty, you know, I think we have the
12 authority; and I think it's a fair and reasonable
13 penalty that we've ordered. But -- But if Qwest
14 disagrees on the penalty, let them appeal that --

15 COMMISSIONER JOHNSON: Sure.

16 COMMISSIONER REHA: -- and we'll see what
17 the courts do with that. But on the restitutional
18 part, that's the most important part of this entire
19 process for me is not so much the penalty as it is
20 the restitutional relief that we are providing
21 through this order. And -- And that's the most

22 important part to me, and I want to do it right.
23 COMMISSIONER JOHNSON: Well, and thank
24 you for that. And I agree with you. In fact, I
25 started writing my opinion on it out in Boulder,
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1 wherever I -- and communicating with staff by phone.
2 And that's the way I was indicating to go. So if
3 Qwest would accept this, I think the 271 would -- in
4 my opinion, in the letter that I'm writing, would be
5 granted to them. But right now it's not.
6 So thank you, Mr. Chair, and thank you,
7 Commissioner. I agree with you.
8 CHAIR KOPPENDRAYER: Other comments or
9 questions?
10 Mr. Topp.
11 MR. TOPP: Sure. First of all, I
12 appreciate the commentary regarding our 271
13 application. I think when we get done here today
14 we'll take a hard look at what the commission has
15 decided and, you know, we'll make a decision at that
16 point. I'm not in a position to make any
17 commitments sitting here today. With --
18 CHAIR KOPPENDRAYER: Mr. Topp, on that
19 point I have a question though. How are you going
20 to affect the commission's concern which you just
21 heard expressed in a way that we can respond --
22 COMMISSIONER JOHNSON: Time.
23 CHAIR KOPPENDRAYER: -- with the time --
24 COMMISSIONER REHA: By the 17th.
25 CHAIR KOPPENDRAYER: -- with the time
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1 remaining that we have to respond?
2 MR. TOPP: I mean, that's one of the
3 challenges because of the -- the time frame that you
4 have to respond, I mean, the wording of the order
5 that's going to come out. We don't have that in
6 front of us. And so it is a challenge. I mean, I
7 think that were you to write your comments, I don't
8 know that between now and the 17th we're going to be
9 able to address that issue. It's -- The 271 process
10 goes on for 90 days, and there's a decision that
11 will be made during that time frame. But in order
12 to -- I simply can't commit that we're going to file
13 anything in the next couple of days that would
14 resolve this issue.
15 CHAIR KOPPENDRAYER: Well, I -- That's
16 helpful to us, because then we're not left in limbo.
17 If we leave here today with this -- the wording of
18 this order, then we'll base our comments on that,
19 assuming that there won't be a response before we
20 have to get our comments to FCC.
21 MR. STANOCH: Chair Koppendray, Members
22 of the Commission, I think that --
23 CHAIR KOPPENDRAYER: Mr. Stanoch.
24 MR. STANOCH: -- probably is the safest
25 way to proceed at this time. I can tell you that
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1 since the commission's meeting last week we've had a
2 number of discussions internally, and we will be
3 reporting back to Denver what happens this morning
4 and further discussing it. But I think what
5 Mr. Topp is saying is that we can't say that we are
6 committing today to giving you an answer on that
7 prior to the 17th.

8 So I think the safest route is to say the
9 commission will modify the order perhaps this
10 morning. That's what we'll be reviewing over the
11 next several days. That's, I assume, what you will
12 be writing your comments on. And as Mr. Topp's
13 indicating, you know, this is other chapters to play
14 out, perhaps, in this story. But we'll -- we'll be
15 communicating on this promptly, what happens here
16 this morning.

17 CHAIR KOPPENDRAYER: Thank you.

18 COMMISSIONER JOHNSON: Mr. Chair, when --

19 CHAIR KOPPENDRAYER: Commissioner
20 Johnson.

21 COMMISSIONER JOHNSON: We've more or less
22 completed -- or I have -- the draft. And when do we
23 have to mail this in?

24 CHAIR KOPPENDRAYER: It has to be there
25 Thursday.

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1 COMMISSIONER JOHNSON: And so you're
2 indicating that you probably won't be able to
3 respond by then?

4 CHAIR KOPPENDRAYER: Well, in -- in --
5 you know --

6 COMMISSIONER JOHNSON: Mr. Stanoch, is
7 that what you're saying?

8 MR. STANOCH: I think, Commissioner --
9 Mr. Chair, Commissioner Johnson, I think I'm
10 indicating that that's probably the safest way to
11 proceed is to assume that's not going to happen. I
12 mean, we will have discussions; and if that changes
13 that we will have an answer by Thursday, we'll
14 notify you promptly. But I think the safest way to
15 proceed is to assume not.

16 COMMISSIONER JOHNSON: Okay. Thank you.

17 CHAIR KOPPENDRAYER: Well, Mr. Stanoch, I
18 think in fairness to -- I realize we're all here
19 because of a whole series of events over a long
20 period of time, and now it's -- it's crunch time.
21 But in fairness to our staff who has to put this
22 together and put these comments together, really
23 those -- those comments are going to be turned in by
24 the commissioners tomorrow, and they're going to put
25 that packet together to go to the FCC. So Wednesday

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1 is too late, I think, to respond to anything that
2 you might. You have to understand that.

3 COMMISSIONER JOHNSON: Well, it wouldn't
4 take much for me to change that one portion at the
5 end.

6 COMMISSIONER REHA: Mr. Chair, I just
7 wanted to clarify --
8 CHAIR KOPPENDRAYER: Commissioner Reha.
9 COMMISSIONER REHA: -- some of my
10 comments because I think they were probably somewhat
11 confusing with respect to my statement last week
12 regarding checklist items. And that is checklist
13 item number 14. And to the extent that 14 relates
14 to the unfiled agreements docket, I don't believe
15 that Qwest has met them unless they complete --
16 unless they agree to the remediate of measures that
17 we've proposed and -- Because I think we had agreed
18 with the ALJ that Qwest could not demonstrate
19 compliance with this checklist item until Qwest had
20 completed whatever corrective actions were required
21 by the PUC in the unfiled agreements docket.

22 Although they've met the portion of that
23 checklist item with respect to TLAs, I don't believe
24 that they've met that checklist item with respect to
25 corrective actions in the unfiled agreements case,

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1 and that will be the context of my -- my comments,
2 that and the public interest having not been met.
3 So I just wanted to make that clarification.

4 CHAIR KOPPENDRAYER: Mr. Topp.
5 MR. TOPP: I guess moving to the merits
6 of the issue. I certainly can discuss that at
7 length with you. We view this case as falling
8 squarely within what the district court determined
9 and can answer any questions along those lines.
10 Certainly, you know, I think that it does increase
11 the risk of this commission's decision being
12 overturned if you attempt to order a discount on
13 interstate access services.

14 And I guess unless there are questions,
15 I'll just leave it at that.

16 CHAIR KOPPENDRAYER: Anyone else want to
17 comment?

18 If not, any discussion on the motion?

19 COMMISSIONER JOHNSON: I'll support her
20 motion.

21 CHAIR KOPPENDRAYER: Hearing none, then
22 all in favor of the motion signify by saying aye.

23 ALL COMMISSIONERS: Aye.

24 CHAIR KOPPENDRAYER: Motion carries 3/0.
25 And that concludes our agenda for today.

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1 Thank you again for your response on short notice.
2 (Proceeding concluded at 10:30 a.m.)
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1 STATE OF MINNESOTA)) ss.
2 COUNTY OF SCOTT)
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REPORTER'S CERTIFICATE

8 I, Angie D. Threlkeld, do hereby
9 certify that the above and foregoing transcript,
10 consisting of the preceding 20 pages is a
11 correct transcript of my stenographic notes, and is
12 a full, true and complete transcript of the
13 proceedings to the best of my ability.
14 Dated April 14, 2003.

ANGIE D. THRELKELD
Registered Professional Reporter
Certified Realtime Reporter